IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.215 OF 1990

The State of Maharashtra ... Appellant

V/s.

1. Nanubai Dhanjibhai Vegada
2. Kisan Babu Solanki ... Respondents

Miss Rajashree Gadhvi, APP, for Appellant-State.

Mr.V.D. Surve for Respondent No.1.

Mr.A.N. Mulla for Respondent No.2

CORAM: **D.G. DESHPANDE &**
SMT.NISHITA MHATRE, JJ.

JUDGEMENT RESERVED ON: **APRIL 2, 2007**
JUDGEMENT PRONOUNCED ON: **MAY 04, 2007**

JUDGMENT (PER SMT.MHATRE, J.):

. This Appeal has been filed by the State against the judgment and order of the Sessions Court, Bombay acquitting the accused who had been charged for offences punishable under section 302 r/w 34 of the Indian Penal Code. The Sessions Court came to the conclusion that the death of the victim Dhanjibhai Vegada was suicidal and not homicidal in nature and, therefore, the accused have been acquitted.

2. It is the case of the prosecution that the accused No.1 and the victim were married. Accused Nos.1

and 2 had an illicit relationship which the victim objected to. Accused Nos.2 and 3, therefore, went to the house of the victim on 16.3.1989 at about 9 pm and threatened to kill him if he harassed accused No.1 any further. According to the prosecution, on 17.3.1989 between 5.30 and 6 am, accused Nos.2 and 3 entered the house of the victim, stabbed him in the neck and ran away. The prosecution has mainly relied on the evidence of the daughter of the victim who was 7 years old at the time of the incident. The prosecution claims that she was an eye witness. On the basis of the statement made by her before the police and on the suspicious behaviour of accused No.1, the prosecution arrested the three accused persons. They were tried for having committed the offence under section 302 r/w 34 of the Indian Penal Code. Accused No.1 was also charged for an offence punishable under section 203 of the Indian Penal Code. The accused have been acquitted by the Sessions Court. The present Appeal has been filed by the State only against accused Nos.1 and 2.

3. The prosecution has relied on the testimony of 11 witnesses in support of its case. PW1 is the seven year old daughter of the victim and accused No.1. PW2 is the sub-tenant of the victim. PW3 is the draftsman who has drawn the plan of the house of the victim where he was found lying dead. PW4 is a neighbour of the victim. PW5 who is also a neighbour of the victim has

been examined as the Panch witness to prove the spot panchanama and inquest panchanama. PW6 is the PSI who has made the Station Diary entry when informed of the incident by accused No.1. He has drawn up the spot panchanama and seized various articles and sent them for analysis to the chemical analyser. He has also prepared the inquest panchanama. The FIR has been lodged by PW6. PW7, PW8 and PW9 have been examined as panch witnesses who have spoken about the seizure of clothes of accused Nos.2, 3 and 1 respectively. PW10 is the Medical Officer who has conducted the postmortem examination. PW11 is the Investigating Officer.

4. The learned Assistant Public Prosecutor has submitted that the Sessions Court was in error in concluding that the death of the victim was suicidal and not homicidal. He submits that the Doctor, PW10, has opined that it was impossible that a gash on the neck, just below the chin of the victim, which was 16 cms X 7.5 cms X 5 cms could have been self inflicted. The Doctor in fact had opined that such an injury could be possible only if somebody else had assaulted the victim. It is submitted that the Sessions Court ought to have accepted the opinion of the Doctor since there was no contrary opinion put forth by the accused. It is further submitted that the testimony of the child witness who has been examined by the prosecution was natural & sincere and ought to have been accepted.

According to the prosecution, there were no compelling reasons to discard the testimony of the child witness despite the fact that it was corroborated to a certain extent by PW2, the sub-tenant of the victim. The learned prosecutor submits that the testimony of the child witness need not be discarded only because it is uncorroborated. Apart from this, she submits that there was a motive for accused Nos.1 and 2 to do away with the victim since they were having an illicit relationship. She submits that the intention of the accused was very clear because accused No.2 had threatened to kill the victim if he continued to harass the accused No.1. It is urged that accused No.1 is equally guilty of the offence since she had submitted false information to the police, that her husband had killed himself when in fact his death was homicidal.

5. The learned advocate for accused No.1 has submitted that there was no evidence at all on record involving accused No.1 in the crime. In fact he submits that if the testimony of the child witness is to be accepted, she has not implicated accused No.1. No other witnesses according to the learned Advocate have spoken about the motive of accused No.1 for killing the victim. In fact, according to the learned advocate, accused No.1 has not been named at all as being a party to the assault on the victim as all the witnesses have stated that she shouted out that her husband was killing

himself when she found her husband was injured.

6. The learned advocate for accused No.2 submits that the testimony of the child witness should not be believed since her statement was recorded by the police about 2 days after the incident. According to the learned advocate, the incident occurred in the early hours of 17.3.1989, while the statement of the child witness was recorded by the police on 19.3.1989. This is fatal to the case of the prosecution, claims the advocate. Apart from this, it is contended that before the testimony of the child witness is accepted, the Court must display great care and caution as it is extremely important that the child should not be tutored by other members of the family, either before the statement is recorded by the police or before the child is examined in Court. He relies on the judgments in *State of Maharashtra v/s. Gajanan Baburao Phakatkar*, **2005 ALL MR (Cri) 306**; *Keru Kondiba Nitnaware v/s. State of Maharashtra,* **2004 ALL MR (Cri.) 1226** and *Bhagwan Singh & Ors. v/s. State of M.P.*, **2003 ALL MR (Cri) 564 (S.C.)** to buttress his arguments.

7. The learned Advocate then submits that it cannot be presumed that the death of the victim was homicidal and not suicidal. He submits that the Doctor has opined that the injury was not self inflicted only because of the dimensions of the wound, especially its depth. He

submits that the postmortem notes indicate that the windpipe had been cut. He therefore urges that the depth of the injury has to be noticed in the context that the wind pipe is a hollow pipe and a stab injury which cuts the wind pipe would automatically be deep. He then submits that although a blood stained knife was found at the scene of offence, the police have not taken any precaution to have the finger prints on the knife analysed. He submits that none of the witnesses speak of any of the alleged illicit relations between the accused Nos.1 and 2 and, therefore, the Sessions Court was correct in coming to the conclusion that accused No.2 was not guilty of the offence with which he was charged.

8. The case of the prosecution is that on 16.3.1989, accused No.2 had threatened the victim by going to his house and warning him to refrain from harassing accused No.1. This fact has been deposed to by both PW1, the child witness and PW2, the sub-tenant. PW1 in fact states that accused No.2 threatened both her parents. PW2 who is the sub-tenant of the victim was staying in the inner room in the flat allotted to the victim. The victim and his family stayed in the outer room. The entrance of the flat was through the room occupied by the victim. PW2 had to pass through this room to enter his own room. PW2 states that accused No.2 used to visit the victim’s house some times and

would converse with both the victim and accused No.1. On the night of 16.3.1989, he found one person standing near his room. He then went into his room and saw accused No.2 talking to the victim angrily. They were conversing in Gujarati which the witness did not follow. Thus, both PW1 and PW2 have spoken about accused Nos.1 and 2 knowing each other and that accused No.2 had threatened the victim the previous night.

9. PW1 has stated in her deposition that she was awake at 5.30 in the morning and found that the accused No.2 had entered into the house. He was armed with a knife. She saw the assault on her father. However, she did not raise an alarm since accused No.2 threatened to kill her and her mother if they raised an alarm. She claims to have awoken her mother when she found the door being opened. She then says that after accused No.1 had struck her father she and her mother raised an alarm due to which accused Nos.2 and 3 ran away. A specific question was put to this witness as to whether the relationship between her parents was good. However, it has been noted by the Sessions Court that the child was not able to understand the meaning of "relationship between her parents". In the cross-examination, this witness has stated that accused No.2 forcibly opened the door to their house and entered in. The spot panchanama does not show that there was any break in. She then states that after she was warned by accused No.2 not to

raise an alarm, she saw accused No.2 strike her father twice with the knife on his neck. She has stated that when accused No.2 came into the room, an electric bulb was on. She has then spoken about her mother going to the police station to inform the police about the death of her father. She has admitted that she did not tell either the police or PW2 or his wife that she had seen accused No.2 stabbing her father. This witness has denied that her mother informed her maternal uncle at the police station that her father had committed suicide. There are several omissions and improvements in the testimony of this witness. The witness has not mentioned anything about her mother being threatened by accused No.2, when her statement was recorded by the police. However, while deposing in Court, PW1 maintained that her mother was also threatened by accused No.2. She has admitted that she stayed with her maternal uncle but denied having been tutored by him. She has then said that her mother had not informed the police or the neighbours that her father had committed suicide. In her cross-examination, this witness has stated that the police spoke to her only on the day of the incident and not thereafter. If that is true, then it is not clear from the case of the prosecution as to how her statement was recorded by the police two days after the incident. According to this witness, after stabbing her father, accused No.2 ran away from the scene of offence. If the evidence of the child witness

is to be accepted, then it would have to be accepted as a whole and not in parts convenient to the prosecution. The testimony of this witness establishes categorically the involvement of accused No.2 in the crime. However, this witness has stated that accused No.2 had threatened both her and her mother when he entered the house. Admittedly, the statement that accused No.2 had threatened accused No.1 as well has been omitted in the statement which was recorded by the police. PW6 is the police officer who has recorded the statements of the witnesses. He has also filed the FIR. This witness has denied that PW1 had in fact disclosed in her statement that accused No.2 had threatened to kill her and her mother if there is an alarm. He has also denied that the witness had disclosed to him that accused No.2 had struck her father with a knife on his neck or that she had stated before him that after the incident accused No.2 had run away. In fact, in the statement recorded by the police, PW1 has stated that she awoke when she heard her father shout. She then saw accused No.2 standing beside her father who was lying in a pool of blood. She saw accused No.2 with a knife in his hand. She has stated that she did not raise an alarm as she was frightened when accused No.2 threatened to kill her if she raised an alarm. The testimony of this witness obviously is an improvement on her statement recorded by the police on 19.3.1989.

10. From the statement recorded by the police, it appears that PW1 was not an eye witness to the incident but has merely seen accused No.2 with a knife in his hand, standing beside the victim who was lying in a pool of blood.

11. As stated earlier, PW2 has corroborated the testimony of PW1. He has spoken about the quarrel between the victim and accused No.2 on 16.3.1989. He has also spoken of quarrels between the victim and his wife, accused No.1. He has stated that on 17.3.1989, he awoke when he heard accused No.1 shout "Kaat raha hai, Kaat raha hai". He looked into the victim’s room and found that he was lying on the floor and his neck was slashed. He has spoken about accused No.1 reporting the incident to the police. He has also noticed that she was not crying immediately after the incident. There are contradictions in the statements of this witness as well. In fact he has been cross-examined by the prosecution at the trial to bring out the contradictions in his evidence and statement recorded by the police. This witness has admitted that the victim was addicted to liquor and he was in habit of shouting and talking loudly under the influence of liquor.

12. PW4 who is the neighbour of accused No.1 has stated that he was awake at 5 pm on 16.3.1989 and he claims to have seen accused No.2 near his house.

According to this witness on 17.3.1989, he heard accused No.1 cry out that her husband was cutting his own neck. He peeped into the victim's room when he heard the shouts and saw him lying on the floor with his throat slashed and blood oozing out from it. He saw accused No.1 outside the room and noticed her shouting and crying. He has spoken about the presence of PW2 at that point of time. PW4 was one of the six or seven persons who followed accused No.1 to the police station to report the incident. This witness was working as a Mukadam at the Borivali Railway station where both accused Nos.1 and 2 were working as sweepers. The testimony of this witness corroborates the depositions of PW1 and PW2 only to the extent that accused No.2 was seen near the house of the victim on 16.3.1989. This witness has not seen the incident in which the victim met with his death.

13. PW5 is the panch witness who has proved the attachment of the articles in the room including the blood stained napkin, pillow, quilt and the knife. He has proved the spot panchanama and inquest panchanama. This witness has stated that when he entered into the room, the victim was found lying with his head resting on a pillow. An handkerchief was found on his left side and a knife was lying beside the victim's body on the right. According to him, the knife was lying about an inch away from the victim's right clenched fist. There

was a trail of blood from the victim's neck upto the door of the balcony. In the Panchanama, it has been noted that the victim's hands were smeared with blood and that a sharp knife was found lying near the left hand of the deceased at a distance of 3 inches from his body. A little later in the Panchanama, it has been recorded that the knife was found lying near the right hand of the deceased. Therefore, it is not clear as to whether the knife was found near the right side of the deceased or on his left. When the Panchanama was recorded at 7 am it was found that the victim's fists were clenched.

14. PW6 is the police officer who has recorded the Station Diary entry and has proved the same. He has assisted in the investigation of the crime. According to him, after returning from the spot of the incident, he recorded an accidental death. However, since he was suspicious of the cause of death of the victim, he made enquiries subsequently on the 17th and 18th March, 1989. He doubted the bonafides of accused No.1 since he noticed that she "was not weeping and grieving openly as was to be normally expected". This witness has lodged the FIR at 1.45 pm on 19.3.1989. There is no explanation by this witness as to why the FIR was not recorded immediately after accused No.1 informed the police and the inquest and spot panchanamas were recorded. There is nothing on record to show that there

was some impediment in recording the case against the accused immediately after the occurrence of the incident.

15. PW7 is the panch witness who has spoken about the seizure of the clothes of accused No.2 According to this witness, reddish stains were found on some clothes of accused No.2 which were seized by the police on 19.3.1989. These clothes were found drying in the hut of accused No.2.

16. PW9 has proved the seizure of the clothes of accused No.1 on 19.3.1989.

17. The next witness examined by the prosecution is the Medical Officer who performed the postmortem examination. He has stated that there was only one incised wound, 16 cms X 7.5 cms X 5 cms on the neck of the deceased just below the chin. The witness has categorically stated that the injury could not have been self inflicted and, therefore, the death was homicidal. According to this witness, the injury could not have been self inflicted and therefore, the death was homicidal. The witness has stated that the injury could not have been caused only by one blow and a horizontal movement of the blade more than once could have caused such an injury. The witness has been extensively cross-examined on behalf of the accused. He has denied

the suggestion that there could be a possibility of the death being suicidal and not homicidal. He has explained that the injury was 5 cms deep and such a deep wound could only be homicidal in nature.

18. PW11 is the investigation officer. He recorded the statement of accused No.1 and noticed her peculiar behaviour. According to him, this behaviour of accused No.1 led to the arrest of accused Nos.1 and 2. He recorded the statements of the witnesses who have been examined by the prosecution before the Court between 19th and 24th March 1989. As noticed earlier, he has denied that PW1 had mentioned while her statement was being recorded that she had seen accused No.2 stabbing her father with the knife. All the improvements made by PW1 in her evidence have been denied by this witness. According to this witness, finger prints could not be deciphered either on the knife or the body of the deceased. After seizing the various blood stained articles, this witness had sent them for analysis to the chemical analyser. The report from the Chemical Analyser mentions that the blood stains detected on the clothes of accused Nos.1 and 2 are of group A. Human blood was also detected on the knife which belonged to the group A.

19. Therefore the circumstances which indicate that the accused No.2 was involved in the homicidal death of

the victim Dhanjibai are: i) he had been seen in the vicinity of the house on 16.3.1989; ii) he had quarrelled with accused No.1 and the victim on 16.3.1989; iii) the child witness had seen him standing beside the victim with a knife in his hands; iv) he ran away from the spot of the offence; v) clothes stained with blood were recovered from him. However, it was not possible to detect the group of the blood stains on his shirt which had blood stains in a few places. The report of the Chemical Analyser indicates that the blood elements were disintegrated and, therefore, the origin could not be determined. His other clothes did not bear any blood stains.

20. These circumstances would indicate that they are links in a chain which point to the only hypothesis and that is, that accused No.2 had assaulted the victim and caused his homicidal death.

21. Accused No.1 has been charged under section 302 r/w 34 of the IPC as also section 203 of the IPC. Before considering whether she shared a common intention with accused No.2 to kill the deceased it would be appropriate to ascertain whether she is guilty of the offence punishable under section 203 of the IPC. This section makes the giving of false information in respect of commission of an offence, punishable. The essentials to attract this section are: i) an offence has been

committed; ii) the accused knew or had reason to believe that such a offence was committed; iii) he gave false information regarding the offence; and iv) the accused had reason to believe that it was false. In the present case, there is no doubt that accused NO.1 has given false information regarding commission of the offence. We have already held that the death of the victim was homicidal and accused No.2 was responsible for his death. Accused No.1 was present alongwith her children including PW1 in the room when accused No.2 entered and assaulted the victim. Therefore, she knew that it was accused No.2 who had committed the crime. Despite this, she informed the police that the victim had committed suicide. It maybe that accused Nos.1 and 2 were having an affair as alleged by the prosecution and it was for this reason that accused No.1 had tried to shield accused No.2 by stating that her husband had committed suicide.

22. We will now advert to the question as to whether accused No.1 is guilty and had a common intention with accused No.2 to kill the victim. Under section 34 of the Indian Penal Code, before a person can be held liable for the acts done by another, it must be established that (i) there was a common intention between the two, such as a pre-arranged plan; ii) there is some participation by that person in the commission of the offence in furtherance of the common intention;

iii) the common intention must be anterior in point of time to the commission of the crime. It is well settled that before a person can be convicted for an offence with the aid of provisions of section 34, the aforesaid ingredients must be satisfied. Sction 34 of the Indian Penal Code requires that the prosecution has to establish that there was a common intention in the sense of a pre-arranged plan between the two accused and secondly, the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless the common intention and participation are both present, this section cannot apply. However, in order to prove the participation it is not necessary that the accused must be actually present in the room in which the offence occurs. He can, stand guard by a gate outside, ready to warn his companions about any approaching danger or wait in a car on a nearby road ready to facilitate their escape. But he must be physically present at the scene of offence and must actually participate in the commission of the offence in some way or the other when the offence is being committed. The antithesis are the preliminary stages, i.e., the agreement, the preparation, the planning which are covered by section 109. The second stage of the commission of the offence involves the plan being put into effect and being carried out. Section 34 is concerned with the latter stage. If several persons have common intention of doing a particular criminal act

and in furtherance of that common intention, all of them aid or abet each other in the commission of the act, then although one of these persons may not actually carry out that act physically, but if he helps by his presence or other acts in the commission of the act, he would be held to have done that act within the meaning of section 34.

23. If the aforesaid test and criteria are applied to the present case, what emerges is as follows:

It is true that there is no direct proof of any pre-arranged plan between accused Nos.1 and 2. It is also true that none of the witnesses have spoken about any illicit relationship between them. A statement has been made by PW1 to the police, that the victim did not like the behaviour of accused No.1 because accused No.2 used to visit their house and accused No.1 was having an affair with him. It is pertinent to note that PW1 is the daughter of the deceased. Due to her age she may not be able to understand the meaning of the term "illicit relationship" but it can be said that she was intelligent enough to grasp the fact that the frequent visits of accused No.2 to the house of the deceased or accused No.1 were not approved by the deceased.

24. Even though we have held that there is no direct evidence of any pre-arranged plan between accused Nos.1

and 2 or about meeting of their minds before commission of the offence, it is equally true that such proof can be gathered in very rare cases from attendant circumstances. The existence of a pre-arranged plan can, therefore, be inferred from the circumstances in the present case.

25. The first circumstance which one would have to bear in mind while considering whether there was a common intention between accused Nos.1 and 2 to kill the deceased is that on the night previous to the incident accused No.2 had visited the house of the deceased and had threatened him in the presence of accused No.1. This fact has been proved by the prosecution through PW4, who had seen accused No.2 near the victim's house on the previous evening. Pw2 also had heard the quarrel between the victim and accused No.2. In fact, PW1 has stated that when accused No.2 came to their house the previous evening he threatened to kill both her parents. In such circumstances, it would be natural for the deceased and accused No.1 to take extra precautions while locking the doors for the night. However, the evidence in this case is that accused No.2 entered into the house of the deceased without having to break in. The victim was lying in one corner of the living room, near the door to the balcony. Accused No.2 after entering the house went to the place where the deceased was sleeping without being obstructed in any manner

whatever and inflicted the fatal blow. Nobody saw him enter the house nor is there any evidence of a break-in. It is, therefore, doubtful that a stranger would be able to enter somebody's house in the early hours of the morning when the doors of any house are invariably locked, unless they are unlocked by somebody from within the house. It is difficult to believe that the deceased and his family were sleeping in their house without locking the main door and thus, in such a fact situation the entry of accused No.2 into the house has to be with the connivance of somebody inside the house. Accused No.1 in her statement under section 313 of the Cr.P.C. has given no explanation as to how accused NO.2 entered the house although specifically questioned in that regard.

26. The prosecution examined Vishnu Kothe, draftsman, as PW3 to prove the map of the scene of block No.2. There is no challenge to the map in the sense that there is nothing to show that this map is not correct. Block No.2 consists of a bedroom, a kitchen, bathroom, a passage, a living room and a balcony abutting the living room. The body was lying in the living room near the door to the balcony. There is only one entrance door to this block i.e., from the living room and no other entrance from outside. PW3 has stated that the entrance to the living room is from the North West corner of living room and it is the only entrance

to the block. Considering the aforesaid factors it is obvious that accused No.2 had gained entry into the victim's house with the connivance of accused No.1; the children being too young to keep the door open.

27. One of the ingredients of section 34 of the IPC requires the presence of the accused at the time of the incident. Undoubtedly, accused No.1 was present in the house. However, this would obviously be so since the victim had been killed in the early hours of 18.3.1981. Accused No.1 would be expected to be present in her own home at that point of time. This circumstance, therefore taken by itself would not indicate the participation of accused No.1 in the crime. However, this circumstance together with the other circumstances would throw light on whether accused No.1 is equally guilty of the homicidal death of the victim.

28. The next circumstance is that accused No.1 had lodged a false report with the police station that her husband had slashed his own throat. She had raised a hue and cry in the building where she stayed, representing to her neighbours that her husband had slashed his throat and had committed suicide. Knowing full well that it was accused No.2 who had killed the deceased, accused No.1 chose to falsely inform the police that the victim had died a suicidal death. The object of accused No.2 in making such a false

representation and filing a false report with the police demonstrates her involvement with the crime. The pre-arranged plan between the two accused thus becomes plainly evident.

29. The fact that accused No.2 had on the previous night threatened to kill the victim in the presence of accused No.1, the fact that accused No.2 gained entry into the house with the obvious connivance of accused No.1 and the fact that the accused No.1 lodged a false report with the police are all pointer to the pre-arranged plan and the common intention between the two accused in such circumstances that is the only irresistible conclusion possible.

30. Apart from this, between 5.30 and 5.45 am, PW4 who was residing in the same flat as the victim heard accused No.1 shouting aloud that her husband was slashing is throat (‘mera mard apne haat se gala kaat raha hai’). PW4 came out of the room he was occupying and saw Dhanjibhai was lying on the floor with his throat slashed and blood oozing from the throat. This would mean, if one is to accept this statement of accused No.1, that she watched while Dhanjibhai was slashing his throat and did nothing to prevent him from doing so.

31. It is clear from the conduct of accused No.1

that she was pretending that she had witnessed Dhanjibhai inflicting an injury on himself. PW6 has stated that he found the conduct of accused No.1 unnatural. Thus, for the aforesaid reasons, we find that accused No.1 shared the common intention with accused No.2 to kill Dhanjibhai. She aided and abetted accused No.2 in committing the murder by letting accused No.1 into the house, representing to the neighbours that the deceased had slashed his throat and lodged a false report to protect accused No.2. Thus, accused No.1 is equally responsible and has to be held guilty alongwith accused No.2 for the homicidal death of Dhanjibhai.

32. Appeal allowed. Accused Nos.1 and 2 are convicted under section 302 r/w 34 of the IPC and sentenced to life imprisonment. Accused No.1 is also convicted under section 203 and sentenced to suffer R.I. for two years. The sentence imposed on accused No.1 to run concurrently. The accused are on bail. Their bail bonds be cancelled forthwith. Accused Nos. 1 and 2 to surrender before the Trial Court within a period of eight weeks from today. If they fail to surrender within the aforesaid period, the Trial Court to take action.

(D.G. DESHPANDE, J.)

(SMT. NISHITA MHATRE, J.)